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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

JAY ROWLAND _____ *Petitioner*

v. No. 488

STATE OF ARKANSAS _____ *Respondent*

RESPONSE TO PETITION AND BRIEF OF PETITIONER JAY ROWLAND FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF IN REPLY TO PETITIONER'S BRIEF AND PETITION

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BRIEF IN REPLY TO PETITIONER'S BRIEF AND PETITION

I

The Petitioner was indicted, tried and convicted under Section 3249 of Pope's Digest of the Statutes of Arkansas.

The Section is as follows:

> "If any persons shall, directly or indirectly, promise, or offer to give, or cause to procure to be promised, offered or given, any money, goods, right in action, bribe, political appointment, political influence, present or reward, or any promise, contract, undertaking, obligation or security for the

payment or delivery of any goods, money, right in action, bribe, political appointment, political influence, present or reward, or any other valuable thing whatever, to any member of the General Assembly of the State of Arkansas, after his election as such member, and either before or after he shall have qualified and taken his seat, or to any officer of the State, or person holding any place of profit or trust, under any law of the State, or under the order of either house of the General Assembly, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending, or may by law, or under the Constitution of the State, be brought before him in his official capacity, or in his place of trust or profit, and shall be convicted thereof, such person so offering, promising or giving, or causing or procuring to be promised, offered or given, any such money, goods, right in action, bribe, political appointment, political influence, present or reward, or any promise, contract, obligation or securing for the payment or delivery of any money, goods, right in action, bribe, political appointment, political influence, present or reward, or other valuable thing whatever, and the member, officer or person who shall in anywise accept or receive the same, or any part thereof, shall be liable to indictment in any court having jurisdiction, and shall, upon conviction thereof, be fined in any sum not exceeding double the amount so offered, promised or given, and be imprisoned in the penitentiary not exceeding two years, and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such office, place of trust or profit as aforesaid shall forfeit his office or place; and any person so convicted shall forever be disqualified to hold any office of trust or profit under the Constitution or laws of this State."

II

The Grand Jury Was Legally and Lawfully Empaneled

At the opening of the September, 1946, Term of the Garland County, Arkansas Circuit Court a Grand Jury was empaneled. In October, 1946, the Court ordered an adjournment of this Grand Jury. Arkansas Law Reporter, Volume 88, No. 16, opinion delivered June 28, 1948, *Rowland* v. *State.*

Section 33 of Initiated Act No. 3, 1936, now being Section 3826 of Pope's Digest of the Statutes of Arkansas provides that any *any time* a grand jury is not in session, the Court, in its discretion, by order entered of record, may empanel a special grand jury. In the case at bar, the regular grand jury was not in session. There is no dispute on this point. Therefore, Section 3826 *supra* was the authority of the Circuit Judge to empanel the special grand jury. Furthermore, on February 21, 1947, and before the order empaneling and calling a special grand jury, the regular jury had been dismissed. *Rowland* v. *State* (Printed record page 92).

The Constitutional Rights of the Petitioner Were Not Violated

Section 8291 of Pope's Digest of the Statutes of Arkansas sets out the qualifications of a grand juror as follows:

> "No person shall be qualified to serve as a grand juror unless he is an elector, temperate, and of good behavior."

SHERIFF I. G. BROWN, *testified* (Printed Record Page 4):

"Q. Did you talk with the Prosecuting Attorney?

A. I talked with the Prosecuting Attorney at various times, yes, sir.

Q. About who you were going to select?

A. No, sir, not about who I was going to select."

SHERIFF I. G. BROWN *further testified* (Printed Record Page 4):

"A. I made my selection on a number of things.

Q. What?

A. Intelligence, reputable business men, and their integrity."

The Constitution and Statutory Law of Arkansas amply protects all rights of the Petitioner.

The Supreme Court of the United States has held that the meaning attributed by the highest court of a state to a statute of the state must be accepted by the United States Supreme Court, on review, as though it had been specifically expressed in the statute.

Supreme Lodge, etc. v. *Meyer* (1924) 265 U.S. 30, 44 S. Ct. 432, 68 L. Ed. 885;

Jackson v. *State* (Tex.1926) 280 S.W. 202, certiorari denied (1926) 46 S. Ct. 474, 271 U.S. 661, 70 L. Ed. 1138.

"We are asked to go into the proper construction of the State Statute and its validity under

the State Constitution. But these are questions of local law, the decision of which, by the Supreme Court of the State, is controlling."

First National Bank of Garnett v. *Ayers* (Kan. 1896) 16 S. Ct. 412, 160 U.S. 660, 664, 40 L. Ed. 573.

A decision of the State Supreme Court is binding on the United States Supreme Court insofar as State law is concerned.

Williams v. *Kaiser* (Mo. 1945) 65 S. Ct. 363, 323 U.S. 471, 89 L. Ed. 398.

The United States Supreme Court will not decide an issue of constitutionality of State Statute if the case may justly and reasonably be decided upon construction of statute under which act is clearly constitutional.

Thompson v. *Consolidated Gas Utilities Corporation* (Tex.) 575 S. Ct. 364; 300 U.S. 55, 81 L. Ed. 510.

Where defendants sought to establish that McKinney's N. Y. Judiciary Law, Section 596, 599, 749 a. a., Sub-divisions 2-4 providing for selection of a special or so-called "blue ribbon" jury panel was so administered as to deny due process and that dual system of jury panels, as administered, denied equal protection of the laws, the function of the Supreme Court concerned only constitutionality and did not concern legislative policy or political judgment.

Fay v. *People of State of New York* (N.Y. 1947) 67 S. Ct. 1613, 332 U.S. 261, 91 L. Ed. 2043.

The Supreme Court of the United States in *Fay* v. *People of State of N. Y.*, 67 S. Ct. 1613, 332 U.S. 261, 91 L. Ed. 2043, said:

> "As there is no violation of a federal statute alleged, the challenge to this judgment under the due process clause must stand or fall on the showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law."

The Petitioner complains herein of the grand jury, *not the petit jury which tried him.*

Article 5 of the Constitution of the United States providing for indictment by Grand Jury does not apply to state courts: It is held by the Supreme Court of the United States:

> "It has been well settled for years that the first ten amendments to the Federal Constitution apply only to the procedure and trial of causes in the Federal Courts and are not limitations upon those in the State courts."
>
> *Gaines* v. *Washington*, 227 U.S. 81, 48 S. Ct. 468, 72 L. Ed. 793.

The objection by Petitioner is to the *formation* of the Grand Jury. It has been held that:

> "The natural and obvious inference is that in the sense of the Constitution 'due process of laws' was not meant or intended to include, *ex vi Termini*, the institution and procedure of a grand jury in any case." *Hurtado* v. *California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Penton* v. *State*, 194 Ark. 503, 109 S.W. (2d) 131.

We submit that this case is decisive of the question of State Grand Jury procedure.

The charge in the case at bar could have been constitutionally filed by the Prosecuting Attorney by information. Amendment No. 22, Constitution of Arkansas.

The Petitioner was not a candidate in the State or County Elections in 1946. *No member of the Special Grand Jury was asked* whether he knew Rowland or what faction Rowland supported. (Printed Record, page 24-70.)

IV

Exchange of Circuits by Judges Did Not Violate Petitioner's Constitutional Rights

The regular judge of the Garland Circuit Court, Judge C. H. Brown, exchanged circuits with Judge Maupin Cummings of the Fourth Judicial District of Arkansas. Article VII, Sec. 22, Constitution of the State of Arkansas provides:

> "The Judges of the Circuit Courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law."

There is no suggestion that Judge Cummings was in any manner disqualified.

The Supreme Court of Arkansas has used the following language in somewhat similar case:

> "The Constitution authorized them to temporarily exchange circuits or hold courts for each other." *Evans* v. *State*, 58 Ark. 47, 22 S.W. 1026.

V

The Indictment Was Framed in Accordance with the Statute

The indictment, under Pope's Digest of the Statutes of Arkansas, need only be as follows:

> "The language of the indictment must be certain as to the title of the prosecution, the name of the court in which the indictment is presented, and the name of the parties. It shall not be necessary to include statement of the act or acts constituting the offense, unless the offense cannot be charged without doing so. Nor shall it be necessary to allege that the act or acts constituting the offense were done wilfully, unlawfully, feloniously, maliciously, deliberately or with premeditation, but the name of the offense charged in the indictment shall carry with it all such allegations. The State upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction." Pope's Digest of Arkansas Statutes, Sec. 3851.

VI

As to the evidence in the case, there could be no constitutional violation of Petitioner's rights.

The Petitioner states that the decision of the Arkansas Supreme Court in this cause amounts to placing upon petitioner, a duty, which was absent from his office of City Attorney.

Section 9819 of Pope's Digest of Statutes of Arkansas provides that a city of the First Class shall elect a

City Attorney. Certainly the elected City Attorney thus becomes the legal representative of the city. The violation of an ordinance of the city is a crime against the city and as legal representative of the city, it is the duty of the City Attorney to advise, aid and assist the proper enforcement agents of the city. Therein lies the basis for the indictment against the Petitioner. It was his duty, as legal representative, to represent the City. It is charged, by the indictment, that certain bribes were paid to Petitioner, with intent to influence his actions as City Attorney pertaining to an ordinance which prohibits gambling.

We do not think and so contend there was or is any violation of any Constitutional right of the Petitioner. No Federal question is here presented. We respectfully urge that the prayer of the petition be denied.

Respectfully submitted

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